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Supreme Court, U.S.
FILED

APR 18 1987

JOSEPH F. SPANIOL, JR.
CLERK

No.

In The Supreme Court of the United States

October Term, 1986

MATTHEW SETERA, *Petitioner, Pro Se*

vs.

TEXAS A & M UNIVERSITY

George W. Kunze, Dean, Graduate College

Frank E. Vandiver, President, Texas A & M University

Jim Mattox, Attorney General, State of Texas

Defendants, Respondents

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

MATTHEW SETERA, *Petitioner, Pro Se*

9 Cumberland Street

Cumberland, Rhode Island 02864

13042

QUESTIONS PRESENTED FOR REVIEW

- 1) Whether the Federal District Court properly found that Petitioner's Suit is barred by the 11th Amendment to the US Constitution.
- 2) Whether there is diversity of citizenship pursuant to 28 USC 1332 (Plaintiff's Memo in Lower District Court)
- 3) Whether denial to amend complain in the Pursuit of Justice (FRCP #15) was proper. (Plaintiff's Motion to Amend)
- 4) Whether there is sufficiency of 11th Amendment Waiver. (See Authorities)
- 5) ✓ Whether opinions of the US Court of Appeals for the First Circuit are erroneous for they do not address the problem. (Appendix)
 - a) Whether Contract is valid and ongoing, as degree program not a terminable one as given in the above opinions.
 - b) Whether opinions of the Lower Courts have sufficiency of validity for overturning those opinions of this High Court and in conflict with them. (S CT Rule 17 a) (and Table of Authorities)
 - c) Why, if not, such ignorance of them in lower courts and in upper court grossly so?

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No. _____

In The Supreme Court of the United States

October Term, 1986

Matthew Setera, *Petitioner, Pro Se*

V

Texas A & M University

George W. Kunze, Dean, Graduate College

Frank E. Vandiver, President, Texas A & M University

Jim Mattox, Attorney General, State of Texas

Defendants, Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

The Petitioner, Matthew Setera, Pro Se respectfully petitions that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit entered on 7 November 1986.

- Opinion Below

The Court of Appeals entered its Memorandum Decision affirming the Federal District Court's Memorandum, judgment and order, and which decision is given in the Appendix.

JURISDICTION

The Jurisdiction of this court is invoked under Title 28 USC 1254
1. (Writ of Certiorari)

Jurisdiction is also invoked under 28 USC 2072 formerly 48 STAT 1064 (to include the 7th Amendment right to jury trial, federal rules, statutes, constitution, matters* pertaining to the U.S. Supreme Court).

*Principle: Stare decisis (Opinions of this High Court remain decided).

Constitutional Provisions Involved

14th Amendment to the US Constitution (Property Rights, "Due Process",...) Articles: III Sec. 2, IV Sec. 2, of the US Constitution.

Article III Sec. 2, (the Judicial Power shall extend to all cases in law and equity arising under this Constitution,...to controversies* ...between a state and citizens of another state, between citizens of different states,...)

Article IV Sec. 2, (The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.)

Jursidiction and Venue (Complaint)

Jurisdiction is also invoked under those statutes found in complaint: 28 USC 1331 (Federal Question), 28 USC 1332 (Diversity of Citizenship: Amount in Controversy; Costs), 28 USC 1343 (Civil Rights and Elective Franchise), 28 USC 1391 (Venue generally), 42 USC 1983 (Civil Action for Deprivation of Rights).

*"The Great Controversy" (11th and 14th Amendments, U.S. Constitution).

Statement of the Case

This suit was brought by Petitioner on 30 January 1986, against Texas A & M University and various state officials in their capacity of common citizenship. Petitioner claims he was denied the opportunity to complete his graduate program which violated his civil rights under the fourteenth amendment and hence, his degree, a property right, was denied in violation of the due process clause of the U.S. Constitution. Petitioner seeks monetary relief.

On 24 March 1986, Case was dismissed by The Honorable Judge Bruce M. Selya, of the U.S. District Court in Providence, Rhode Island. Petitioner consequently filed his appeal to the U.S. Court of Appeals for the First Circuit which likewise affirmed District Court's Judgment, Memorandum, and Order.

Statement of Facts

Petitioner is a former graduate student enrolled at the Texas A & M University and alleges that a contract was breached between himself and the University as regards the University's catalogue, and Handbook on Rules and Regulations when he was denied permission to take exams, was forcefully mandated to take other courses not required, and other matters. (See Complaint).

Arguments and Authorities

In spite of the evidence on the following case histories favorable to Petitioner, containing opinions of this High Court, and presented to the U.S. Appeals Court, it was nonetheless, summarily ignored and their own substituted. The three judges en banc knew or should have known that the programs and degrees offered at Texas A & M University have not been discontinued or rescinded but are ongoing and therefore not a terminable one as in the Jimenez V Almodovar, 650, F. 2d. 363, 370 (1st Cir. 1981). Thus the District Court's Memo and Judgement and Order

was affirmed and the Appellate Court's opinions established in lieu of and ignoring the U.S. Supreme Court's opinions, and in violation of the Stare Decisis Principle.

Petitioner continues to affirm that by this denial of his attempt to implement FRCP #15, in the pursuit of justice, his "due process" within both lower courts as volatile and violated!

It is to be noted that evidence brought to the U.S. court of Appeals was not available to the Court of First Instance since motion to amend complaint and present further pleadings was denied as well as extension of time for presenting such evidence.

Finally, considering the justices' very own opinions: The totality of extenuating circumstances and not the face of complaint is the issue that matters. (See middle of *Scheuer V Rhodes* 216 U.S. 234 p. 237)

And Special Thanks to Justice Mr. Ferdinand Powell, monetary damages are not barred under circumstances such that plaintiff asserts, i.e., against state officials in their individual capacities. (See *Wood V Strickland*, 420 U.S. 308 p. 321 [1974] p. 322, & p. 329 [footnote² bottom of page]).

See also *Scheuer V Rhodes* 416 U.S. 232, 40 L. Ed. 2d 90 CITE as 94 S Ct 1683 (1974) p. 1683 Middle Left Column, p. 1683 Right Hand Column, 2. Federal Procedure, 4. States, & p. 1684 6. Federal Civil Procedure (Please Note: Appellant having submitted evidence, no opportunity was afforded.)

Authorities

The following authorities are necessary to have a fuller understanding of the following aforementioned arguments already presented and within the body of this petition for Writ for Certiorari to the U.S. Court of Appeals First Circuit.

Procunier V Navarette 434 US 555 p. 562

Scheuer V Rhodes 416 US 232-250 (Certiorari) p. 232 Held: 1., 2., p. 237.

(Opinions given here & related cases by Former Chief Justice Warren Burger).

Scheuer V Rhodes 416 US 232, 40 L. Ed. 2d 90 CITE as 94 S. CT 1683 (1974) 1. p. 1683 Middle Left Column: On Certiorari, 2. p. 1683 Right Hand Column 2. Federal Civil Procedure 4. States 6. Federal Civil Procedure p. 1684 7. Civil Rights

Wood V Strickland 420 US 308 p. 321 (1974) (Opinion of Justice Powell) p. 322 p. 329 Footnote² at bottom of page (Now Given: ²The opinion indicates that actual malice is presumed where one acts in ignorance of the law.)

The above evidence contains only excerpts but contain their own sufficiency. See Appellant's Brief for a fuller development.

Expressed waiver given in Zentgraf V Texas A & M University 492 R.S. 265 p. 272. See also Texas Revised Civil Statutes Ann. Art. 6252-26 §1 (a) (2) (Vernon 1972 & Supp. 1979)

(Expressed Waiver)

With regard to the individual defendants, the State of Texas is liable for all actual damages, court costs, and attorney's fees adjudged against officials or employees of any institution of the state where the damages are based on an act or omission by the person in the course and scope of his office or employment for the institute. (p. 11 in Appellant's Brief).

Summary of Argument

Petitioner alleges both courts below were erroneous because:

- 1) They failed to permit petitioner to amend his complaint to conform to evidence.
- 2) Both failed to fully consider the controversy between the 11th and 14th Amendments to the U.S. Constitution, and the latter blatantly so, in view of the evidence presented to it.
- 3) The Principle: Stare Decisis of this High Court was overturned by the Appellate Court and in gross violation of it.
- 4) Waiver arguments were summarily ignored in both Lower Courts.

Reasons for Granting the Writ

The review of Federal Rules of Civil Procedures (28 USC 2072), and the Principle: Stare Decisis, and "The Great Controversy" is proper to this High Court exclusively.

Conclusion

For the aforementioned reasons given briefly, Petitioner requests that the decisions of both Lower Courts be reversed, and request for Jurisdiction and reliefs sought be granted and affirmed, and case be remanded back to the Federal District Court in Providence, Rhode Island, for trial by jury (7th Amendment Right). (To include Amending Complaint.)

Respectfully Submitted,

Matthew Setera
Petitioner, Pro Se
9 Cumberland Street
Cumberland, Rhode Island 02864

APPENDIX A
(NOT FOR PUBLICATION)

United States Court of Appeals
For the First Circuit

No. 86-1450

MATTHEW SETERA,
Plaintiff, Appellant

v.

TEXAS A & M UNIVERSITY,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Hon. Bruce M. Selya, U.S. District Judge]

Before

Coffin, Bownes, and Br  yer,
Circuit Judges.

Matthew Setera on brief, pro se.

Carla M. Crisford, Assistant Attorney General,
Jim Mattox, Attorney General of Texas, Mary F. Keller,
Executive Assistant Attorney General for Litigation, and
J. Patric K. Wiseman, Chief, State & County Affairs, on brief
for appellees.

November 7, 1986

Per Curiam. We have reviewed the record and the briefs on appeal. We affirm the district court judgment for the reasons stated in that court's memorandum and order of March 24, 1986. To the extent that the appellant is alleging a breach of contract claim, we add that we have held that a mere breach of a contractual right by a governmental instrumentality does not state a claim of a constitutional violation. Casey v. DePetrillo, 697 F.2d 22, 23 (1st Cir. 1983); Jimenez v. Almodovar, 650 F. 2d 363, 370 (1st Cir. 1981).

We reject the appellant's contention that the district court's failure to give him any further extension of time in which to file his objection to the defendants' motion to dismiss, beyond the twenty-day extension which the appellant asked for and received, was a violation of due process. We also find no error in the denial of the appellant's motion to amend judgment.

Affirmed.

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

No. 86-1450

MATTHEW SETERA,
Plaintiff, Appellant,

v.

TEXAS A & M UNIVERSITY,
Defendant, Appellee.

JUDGMENT

Entered: November 7, 1986

This cause came on to be submitted on the briefs and the original record on appeal from the United States District Court for the District of Rhode Island.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

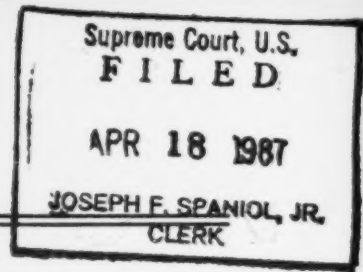
By the Court:

Francis P. Scigliano
Clerk

[cc: Mr. Setera and Ms. Crisford]



86 1730



No.

In The Supreme Court of the United States

October Term, 1986

MATTHEW SETERA, *Petitioner, Pro Se*

VS.

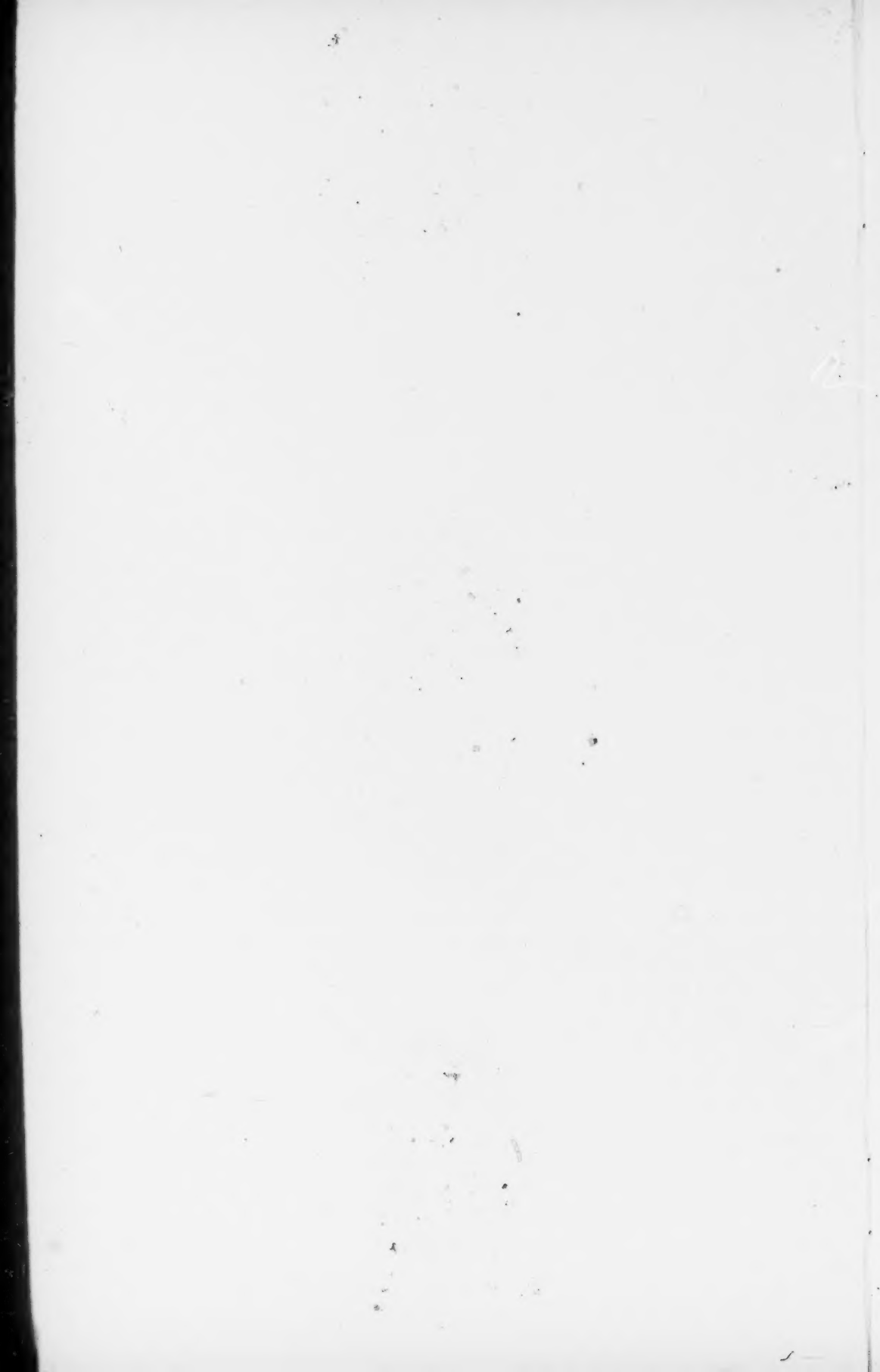
TEXAS A & M UNIVERSITY

George W. Kunze, Dean, Graduate College
Frank E. Vandiver, President, Texas A & M University
Jim Mattox, Attorney General, State of Texas
Defendants, Respondents

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
SUPPLEMENTAL APPENDIX**

MATTHEW SETERA, *Petitioner, Pro Se*
9 Cumberland Street
Cumberland, Rhode Island 02864

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SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

MATTHEW SETERA, :
 : plaintiff, :
 :

vs. : C. A. No. 85-0653-S

TEXAS A & M UNIVERSITY, :
GEORGE W. KUNZE, :
DEAN, GRADUATE COLLEGE, :
FRANK E. VANDIVER, :
PRESIDENT, TEXAS A&M UNIVERSITY, :
and JIM MATTOX, ATTORNEY GENERAL, :
STATE OF TEXAS, :
 : defendants. :
 :

Memorandum and Order

1

BRUCE M. SELYA, United States District Judge.

The plaintiff, Matthew Setera, appearing pro se,

filed an amended complaint¹ with this court on January 30, 1986, against Texas A&M University and various state officials in their representative capacities.² The defendants moved to dismiss. The plaintiff has objected.

¹The plaintiff's original complaint, docketed in late 1985, was never served on the defendants. Instead, Setera filed and served an amended complaint as of right. Fed. R. Civ. P. 15(a). That document henceforth will be referred to as the "complaint."

²There is no suggestion in Setera's complaint that he is suing defendants Kunze, Vandiver, and Mattox in their individual capacities. To the contrary, Paragraph 2 of the complaint, which describes the defendants, indicates that the three state officials are sued solely in their official capacities. Moreover, the plaintiff's recitation of the events upon which his complaint is based is devoid of reference to these individuals. See Complaint at ¶¶ 5-9.

The complaint, in its principal thrust, is brought pursuant to 42 U.S.C. § 1983 and the fourteenth amendment. Setera, a former doctoral candidate at Texas A&M, apparently alleges that the university's catalogue and handbook on rules and regulations created a contract between him and the defendants, and that the failure of the defendants to permit the plaintiff to sit for his examinations constituted a breach of contract. The plaintiff also alleges that the pursuit of the degree constituted a property right, such that defendants' denial of plaintiff's opportunity to complete his schooling violated his civil rights in violation of the fourteenth amendment. While the plaintiff makes

other assertions (for example, that his rights were violated when his financial assistance was discontinued), the gist of his case appears to be that he was denied a property right in violation of the due process clause of the federal Constitution. Setera prays exclusively for monetary relief in the form of compensatory, consequential, and punitive damages. The complaint makes no request for reinstatement into the doctoral program at Texas A&M; it neither mentions nor hints at any desire to secure injunctive and/or declaratory relief.

In their motion to dismiss, the defendants claim that the suit is barred by the eleventh amendment and that

the court lacks subject matter jurisdiction because a state agency is not a "citizen" for purposes of diversity jurisdiction. In the alternative, the defendants solicit transfer of the action to the United States District Court for the Southern District of Texas. This court need not wander beyond the first ground of the defendants' motion. Setera's suit is barred by the eleventh amendment.

The eleventh amendment deprives a federal court of jurisdiction over "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." U. S. Const., Amend. 11. The amendment prohibits suits for monetary relief by private parties against a state (and its agencies), unless the state has

consented to be sued, Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 101 (1984); Alabama v. Pugh, 438 U.S. 781, 782 (1978); Edelman v. Jordan, 415 U.S. 651, 663 (1974); Healey v. Bendick, C. A. No. 85-0341-S, slip. op. at 30-32 (D.R.I. Feb. 12, 1986), and then, only in manner and form as permitted by the tenor of the consent. See cases ante.

Congress, of course, pursuant to a valid exercise of its powers, may act to abrogate eleventh amendment immunity. Pennhurst, 465 U.S. at 99; Healey, slip op. at 31-32. But, contrary to Setera's remonstrance, see Plain-tiff's Memorandum at 1, the enactment of 42 U.S.C. § 1983

did not work such an abrogation; the Supreme Court has held repeatedly that the eleventh amendment bars suits under § 1983 against entities and officials so closely affiliated with the state as to make the state the real party in interest. Quern v. Jordan, 440 U.S. 332, 338-45 (1979); Pugh, 438 U.S. at 782; Edelman, 415 U.S. at 663-64. Although the plaintiff alludes to other provisions of the Civil Rights Acts as well, e.g., Plaintiff's Memorandum at 1, they need not be discussed; none of them are engaged by any of the factual averments of the complaint. And, the bootstrap argument that Congress's grant of general federal question jurisdiction, 28 U.S.C. § 1331, suffices to override the eleventh amendment is palpably wrong.

To determine whether the entity sued, Texas A&M University, is an arm of the state or an independent political subdivision, see Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 280 (1977), a court must examine the legal relationship between the entity and the state. See Jagnandan v. Giles, 538 F.2d 1166, 1173 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977). As the Fifth Circuit pointed out:

If Texas A&M University is an arm of the state such that any recovery of damages would, in effect, be against the state, to come from the state treasury, the Eleventh Amendment would bar the action and recovery. If the University is an independent political body or has in some manner waived its immunity, however, monetary recovery would not impinge on the Eleventh Amendment.

Gay Student Services v. Texas A&M University, 612 F.2d 160,
165 (5th Cir. 1980) (footnotes omitted).

Following these directives, a Texas district court conducted a lengthy and well-reasoned study of the relationship between Texas A&M and the State of Texas and concluded that "a suit against the University or its officials for monetary relief is a suit against the state and thereby barred by the Eleventh Amendment." Zentgraf v. Texas A&M University, 492 F. Supp. 265, 271 (S.D. Tex. 1980). The close relationship between the school and the state "persuaded [the court] that Texas A&M University is an alter ego of the State of Texas." Id. at 272 (emphasis in text). In

addition, the Zentgraf court found that Texas had not waived its eleventh amendment immunity to suit. Id.

The Fifth Circuit has followed the reasoning and conclusion of Zentgraf to bar suits seeking monetary relief from Texas A&M. See Gay Student Services v. Texas A&M University, 737 F.2d 1317, 1333-34 (5th Cir. 1984). And, other federal courts have reached essentially the same outcome in surveying the status of other state-operated institutions of higher learning in Texas. E.g., LeCompte v. University of Houston System, 535 F. Supp. 317, 319 (S.D. Tex. 1982); Henry v. Texas Tech University, 466 F. Supp. 141, 145-47 (N.D. Tex. 1979). There is no doubt that these

precedents are determinative with respect to this plaintiff's suit against Texas A&M. (Setera's suggestion that Rhode Island law is somehow material on this point, Plaintiff's Memorandum at 2, is not well-taken.)

The suit must also fail as against the remaining defendants. As mentioned, see ante n.2, each is sued in a purely representative capacity (Kunze and Vandiver, respectively, as 'officials of Texas A&M; Mattox as the state's attorney general). For this reason, these defendants also partake of the prophylaxis of the eleventh amendment. See Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690 n. 55 (1978) (official-capacity suits "represent only another way of pleading an action against an entity of

which an officer is an agent"). What this court recently observed in Healey, slip op. at 351, is equally apropos to the case at bar:

This action, insofar as it seeks to impose liability on these defendants in their official capacities, in reality seeks to impose liability on the state itself. The Eleventh Amendment to the federal Constitution stands squarely in the way.

It is plain that the damages which Setera seeks, if awarded against any of the present defendants, would be paid from the public fisc. See Tex. Rev. Civ. Stat., art. 6252-26, § 1(a)(2) (Vernon 1972 & Supp. 1979). The state is, therefore, the real party in interest, and the blanket of sovereign immunity enswathes all of the named defendants.

The final string to the plaintiff's bow is his attempted invocation of this court's diversity jurisdiction. 28 U.S.C. § 1332(a). It is well settled that neither a state nor a state agency can be considered a "citizen" for diversity purposes. See id. See also Postal Telegraph Cable Co. v. Alabama, 155 U.S. 482, 487 (1894) ("A State is not a citizen. And, under the Judiciary acts of the United States, it is well settled that a suit between a State and a citizen or a corporation of another State is not between citizens of different States; and that the [federal court] has no jurisdiction of it unless it arises under the Constitution, laws or treaties of the United States.") Thus,

there can be no diversity of citizenship between Setera and the university.

As to the individual defendants, three additional observations are pertinent: (i) as each is sued only in his representative capacity, see ante, the same rule ought to apply. (ii) the plaintiff, who has the burden of alleging facts sufficient to demonstrate the court's jurisdiction, has not set forth the citizenship of any of the defendants or any other facts demonstrating an acceptable jurisdictional predicate;³ and (iii) the complaint, even when read with

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³"[Federal jurisdiction cannot be assumed but must be clearly shown." Brooks v. Yawkey, 200 F.2d 663, 664 (1st Cir. 1953).

the indulgence to be accorded to a pro se suitor, Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam), fails to state any claim whatever against any of these defendants. Though the plaintiff has chosen to represent himself in this litigation, the court's liberality cannot extend to the conjuring up of unpled allegations. McDonald v. Hall, 610 F.2d 16, 19 (1st Cir. 1979). It is, of course, settled beyond peradventure that a complaint which "lacks a minimally sufficient factual predicate...cannot stand." Cok v. Fay, C. A. No. 85-0097-S, slip op. at 4 (D.R.I. July 18, 1985). See also Slotnick v. Staviskey, 560 F.2d 31, 33 (1st Cir. 1977). And, the sockdolager is simply this: the elev-

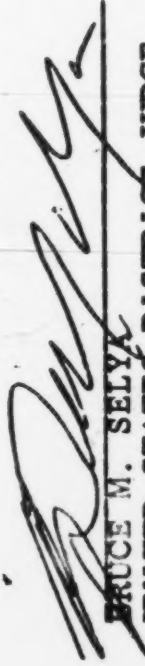
enth amendment obstacle looms equally large as to the state law breach of contract claim which Setera sponsors under the aegis of diversity jurisdiction.

The court does not question the sincerity of the plaintiff's thinly-veiled indignation at what he perceives as a grievous wrong, and the court sympathizes with Setera's frustration in the face of "all the pertinent garbage that goes on in these courthouses." Plaintiff's Memorandum at 4. Yet, what the plaintiff tosses lightly aside as "garbage" are the very rules of law which insure fairness and justice in our society. These rules cannot be trampled by any man, no matter how noble his cause.

For the reasons articulated above, the defendants' motion to dismiss must be, and it hereby is, granted.⁴ The case is dismissed for want of subject matter jurisdiction. The clerk is directed forthwith to enter judgment for the defendants for costs.

So ordered.

Enter:


BRUCE M. SELYA
UNITED STATES DISTRICT JUDGE

March 24, 1986

⁴The record in this case suggests severe (perhaps insurmountable) problems anent this court's in personam jurisdiction over each and all of the defendants. The court simply notes those difficulties, without expressing any opinion thereon. In light of the disposition of the case on other grounds, see text ante, it is unnecessary at this time to reach questions of personal jurisdiction. It is likewise unnecessary to consider the defendants' venue contentions. And similarly, the plaintiff's informal request for class action certification, Plaintiff's Memorandum at 3-4, need not be addressed.

JUDGMENT IN A CIVIL CASE

United States District Court		DISTRICT	RHODE ISLAND
CASE TITLE		DOCKET NUMBER	
MATTHEW SETERA		CA 85-0653 S	
TEXAS A & M UNIVERSITY ET AL		NAME OF JUDGE OR MAGISTRATE	Bruce M. Selya
V.			
<input type="checkbox"/> Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.			
<input checked="" type="checkbox"/> Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.			
IT IS ORDERED AND ADJUDGED			
JUDGMENT is entered for the defendants for costs.			
CLERK		DATE	
(BY) DEPUTY CLERK:		3/24/86	
Katherine Ferguson			

